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IN THE

Supreme Court of the United States

October Term, 1965

No. 1112

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW and those similarly situated,
Appellants,

v.

CHIEF EAGLE SEELATSEE, individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION,
Appellees,

UNITED STATES OF AMERICA,
Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

Reference to the Official Or Unofficial Reports

The opinion of the court below is unofficially reported at 244 F. Supp. 808.

Nature of the Proceeding

This is an action to enjoin the appellee tribal council and its chairman from prosecuting a claim of escheatment to real property and certain monies on behalf of the Confederated Bands and Tribes of the Yakima Nation, because the Act of Congress requiring such escheatment is unconstitutional.

Statute Pursuant to Which This Action Is Brought

Jurisdiction of the three-judge district court to entertain the complaint is based on 28 U.S.C. 2282 and 28 U.S.C. 1331.

Dates of the Judgment, Order on Rehearing and Notice of Appeal

The judgment dismissing the complaint was entered December 6, 1965. The order denying the Motion for New Trial was entered December 29, 1965. The Notice of Appeal was filed January 26, 1966. The United States District Court for the Eastern District of Washington, Southern Division, is the Court below.

JURISDICTION

28 U.S.C. Sec. 1253 confers jurisdiction on this Court, and 28 U.S.C. Sec. 2101 (b) sets the time limits.

Cases supporting jurisdiction in this Court: *Radio Corp. v. United States,* 341 U.S. 412 (1951); *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713 (1962); *Florida Lime Growers v. Jacobsen,* 362 U.S. 73 (1960).

The Statute Whose Validity Is Involved

The statute sought to be declared unconstitutional is Section 7 of the Act of August 9, 1946, 60 Stat. 968 (25 U.S.C. Sec. 607) which reads as follows:

> "After August 9, 1946, only enrolled members of the Yakima Tribes of one-fourth or more blood of such tribes shall take by inheritance or by will any interest in that part of the restricted or trust estate of a deceased member of such tribes which came to the decedant through his membership in such tribes or which consists of any interest in or the

rents, issues or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855, (12 Stat. 951) except that a surviving spouse of less than one-fourth of the blood of the Yakima Tribes may receive by inheritance or devise the use for life of one-half of the restricted or trust lands of the decedent located within the Yakima Reservation or within the area ceded by the said treaty of June 9, 1855."

We have included in the Appendix herein certain other statutes which might prove helpful, namely:

1. The entire Act of August 9, 1946, 60 Stat. 968, 25 U.S.C. Sec. 601-607, Appendix page. 13

2. 25 U.S.C 331 (Section 1 of the Act of February 8, 1887, 24 Stat. 388, as amended). Appendix page. 16

3. 25 U.S.C. 348 (Sec. 5 of the Act of February 8, 1887, 24 Stat. 389, as amended). Appendix page. 17

4. 25 U.S.C 372 (Sec. 1, Act of June 25, 1910, 366 Stat. 855 as amended). Appendix page. 19

5. 25 U.S.C. 373 (Sec. 2, Act of June 25, 1910, 36 Stat. 856, as amended). Appendix page. 21

6. R.C.W. 11.04.020, Appendix page. 22

And we have included in the Appendix portions of 25 C.F.R. Part 15 deemed helpful, Appendix page. 22

QUESTIONS PRESENTED

Pursuant to the General Allotment Act 1887, 24 Stat. 388 (25 U.S.C. 348). The United States issued its patent in 1915 to the real property here involved (Yakima Allotment No. 3839) to the remote ancestor of the appellants and *to her heirs*. The original patentee died and by the applicable statute of descent and distribution title

eventually resided in Josph Simmons, Sr. In 1946, Congress enacted Sec. 7 of the Act of 1946, requiring enrollment and one-quarter quantum of Yakima Indian blood for a decedent to give an allotment by last will or to permit passing by the statute of descent to his heirs or children on the one hand, or requiring escheatment to the Yakima Nation if the devisees or heirs fail to qualify, on the other hand. Mr. Simmons died in 1960 intestate. The appellant Indians, his heirs, are not enrolled and do not have the required quantum of Yakima blood. Is Section 7 of the Act of 1946 consitutional, requiring the real property to escheat?

STATEMENT OF THE CASE

The children and grandchildren of the intestate, Mr. Simmons, Sr., claim that under the Statute of Descent of the State of Washington, R.C.W. 11.04.020(5), which has been adopted by Sec. 5 of the General Allotment Act (Appendix page 17, 25 U.S.C. 348) as the applicable statute, they are entitled to inherit and the intestate is entitled to rely on his children receiving the Indian Allotment in question.

The appellants thus are seeking to enjoin the appellees in insisting on the provisions of Sec. 7 of the Act of 1946 which would require escheatment of the property to the tribe.

The United States intervened as "guardian of the Indian allottees" and *is urging escheatment.*

I.

This Case Is Important Because Public and Private Agencies Have Decried the Law's Unjustness, Be-

cause It Has Deprived Several Hundred Indian Children of Their Inheritances and Because the Secretary of the Interior Is Continuing to Enforce It.

a. The Secretary of the Interior has characterized Section 7 as "unjust and work(s) a hardship on certain members of the family of a deceased Yakima Indian by denying them the right to inherit or take by will any part of the trust or restricted estate of the spouse, parent, or relative. Of 192 estates probated through May 31, 1957, under the section of the Act, 133 enrolled Yakimas, including husbands, wives, children, grandchildren, and other relatives, were excluded from sharing in estates because they did not have the required quantum of Yakima blood; 126 persons, including husbands, wives, children, etc., were excluded because they were not enrolled members of the tribe; and 32 spouses, being unenrolled persons, were limited to a life estate in one-half of the real property of the decedent. Such a pattern of inheritance and denial of the right of the spouse, children, and others to share in the estate of the decedent is the result solely of Federal legislation and is not to be found in the laws relating to other Indian tribes or to non-Indians. In our opinion, the record presented clearly establishes the injustice imposed by the existing provision of law and is strong justification for its repeal." (Hearings on H.R. 4005, 85th Congress, Second Session, Committee on Interior and Insular Affairs, Serial No. 26, Pages 2-3).

b. Our next reason to show importance is stated in the words of Congressman Al Ullman of Oregon, namely:

"Mr. Sigler, (Solicitor, Department of the Interior) I am particularly interested in this discriminatory

provision with regard to inheritance, because it has worked a great hardship on the members of the Umatilla Tribe. The Yakimas have been able to inherit the Umatilla properties and, of course, the reverse has not been true, and they have been excluded time after time in inheritance.

"So this problem is going to be handled one way or the other: Either the Umatillas are going to retaliate in kind or else the provison is going to have to be repealed." (Hearings on H.R. 4005, 85th Congress, Second Session, Committee on Interior and Insular Affairs, Serial No. 26, Page 13).

c. With the denial of their inheritance or bequest, some Indian heirs and devisees have become public charges. (Hearings on H.R. 4005, 85th Congress, Second Session, Serial No. 26, Page 21).

d. A leader of a minority group has protested Section 7, namely:

"The said law of August 9, 1946, has done immeasurable and boundless damage to the morale of the Yakima Indians. It has worked an injustice upon certain Indian children, it has disinherited husbands, wives, children, grandchildren, and other relatives of deceased enrolled members of the Yakima Tribes." (Hearings on H.R. 4005, 85th Congress, Second Session, Serial No. 26, Page 15).

e. Some 80 directly affected individuals to a questionnaire issued by the Bureau of Indian Affairs responded by deploring this law, for example:

"My problem is with my heirship land. I wish the Yakima Reservation would repeal their inheritance law which leaves lots of people who have children like in the Warm Springs Reservation or other places. Their own children cannot inherit their property. It just doesn't seem right, that's all." (Indian Heirship Land Study, Analysis of Indian Opinion as Expressed in Questionnnaires, Volume 1, 86th

Congress, 2d Session, House Committee Print No. 27, Dec. 31, 1960, Page 503).

f. The Associate Commissioner of Indian Affairs has officially stated that the limitation on inheritance "is a substantial factor in keeping people on the reservation, persons who might otherwise decide to choose a job or vocation somewhere else. It is bound to be a factor. I think it is a little bit like the farmer that says to his sons, 'I am going to disinherit anybody that moves away from the old farmstead.'" (Hearings on H.R. 1176, 86th Congress, First Session, Committee on Interior and Insular Affairs, Serial No. 7, Page 17).

II.

This Case Should Be Reversed Because the Appellants Have Been Deprived of Their Property By Reason of Their Blood-Line and Because the District Court's Justifying the Unequal Inheritance as an Effort to Regulate Enrollment Is a *Non Sequitur*, Inheritance and Enrollment Being Separate Events.

a. An allotment, such as we have here, for all practical purposes is the vesting in the allottee of a tenancy in fee simple absolute, except that he cannot alienate it without Secretary of the Interior approval. This is a protective device to prevent his impoverishment.

We can compare an allotment running to an Indian and *his heirs*, on the one hand, to a treaty-recognized right of occupancy in a tribe with respect to its tribal area, which has reserved in the United States technical legal title, on the other hand.

In *Shoshone Tribe v. United States*, 299 U.S. 476, (1937), to a defense by the United States that a taking by the United States "created *** (no) liability, con-

stitutional or contractural***," 299 U.S. 476, 483, the court held that such taking was "an appropriation of property within the meaning of the Fifth Amendment***." 299 U.S. 476, 496.

Ergo, the rights conferred on an allottee likewise are within the protection of the Fifth Amendment and the decision below is wrong.

b. Plenary power over Indians, (which the District Court asserts justifies the enactment of Section 7, 244 F. Supp. 808, 813), can be utilized admittedly to authorize invasion of Indian property rights which accrues to their ultimate *benefit, Tiger v. Western Investment*, 221 U.S. 286; but such plenary power was extended by the District Court to depriving an Indian of his primary, vested rights. This ruling was in the face of *United States v. Creek Nation*, 295 U.S. 103, (1935), which tells us that "this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions." 295 U.S. 103, 110. Enough said.

c. The Court below urged such cases as *Baker v. Carr*, 369 U.S. 186, as authority that regulating Indians is a political problem and thus not within the judicial power to investigate, 244 F. Supp. 808, 813. The dictum therein mentioned, 369 U.S. 186, 215, 283, relates to the determination of whether a tribe is a tribe. It is wholly irrelevant to justify the deprivation of *patented* lands. Such comment is *Baker* was never intended to be controlling law over patented Indian lands and cannot by

such innocuous treatment (as applied to this case) be even a make-weight in overruling the *Creek Nation* and *Shoshone Tribe* cases. The trial court, we submit, demonstrated a fundamental misunderstanding of Indian property rights.

d. Next the Court erred in arguing that the regulating of enrollment was a legitimate basis for classifying which Indian could inherit or devise and which could not.

The two problems of enrollment and inheritance are separate and distinct. The Solicitor for the Department of the Interior put it thusly:

> "We feel that membership is separable and should be considered separately from the right to inherit." (Hearings on H.R. 1176, 86th Congress, First Session, Serial No. 7, Page 12-13).

And so, our first point is that the depriving of an inheritance of patented lands is a *non sequitur* from the power to regulate enrollment.

In addition, we urge that regulating enrollment is a sort of power justifiable under the police power. After all, the Congress must have authority to regulate in general Indian affairs, so the argument goes. Assuming such, there is an area of law where the police power must yield to other portions of the Constitution. Thus, while the Congress can regulate aliens, the forbidding of their employment cannot be "a peril to the public welfare(,)" for that would convert the equal protection clause into "a barren form of words." *Truax v. Raich*, 239 U.S. 33, 41, (1915). Consequently, the police power as represented in the words "peril to the public welfare" cannot deprive an alien's right to employment. It is a *non sequitur*.

We can illustrate our argument of "no reasonable relationship" between the regulation of enrollment and the depriving of inheritance and testamentary rights by *Korematsu v. United States*, 323, U.S. 214, (1944). Because of the Japanese war, the United States excluded persons of Japanese ancestry from the Pacific Coast states. Had the United States said because of the war she would deprive Japanese of their property, then this would have been a *non-sequitur*.

As in *Shelley v. Kraemer* 334 U.S. 1 at page 21 (1948), "a state law which denied equal enjoyment of property rights to a designated class of citizens of a specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws." Assuming the right to regulate enrollment, it cannot justify the deprivation of *property* rights.

Finally, we urge that the appellants have been denied the equal protection of the law by the Congress, a doctrine which has just about been wholly adopted into the Fifth Amendment by *Bolling v. Sharpe*, 347 U.S. 497 (1954). Section 7 is the only statute of its kind. It treats one group of Indians in the Yakima area differently than others; it treats the Yakima Indians differently than other Indians in the State of Washington; it treats this group differently than other citizens of the State of Washington.

Regan v. Farmer's Loan & Trust Co., 154 U.S. 362 (1894), at page 399, tells us:

> "The equal protection of the laws, which by the Fourteenth Amendment no state may deny to the

individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."

e. The appellants have a substantial claim to their right to sue.

The complaint is brought by the children and grandchildren of Joseph Simmons, Sr., who died May 2, 1960. On his death, the Secretary of the Interior took charge of his estate pursuant to 25 U.S.C. 372, the Act of June 25, 1910, (Appendix page 19), which confers on the Secretary probate jurisdiction over Indian allotments. The Secretary has implemented the Act of June 25, 1910, by promulgating 25 C.F.R. Part 15 (Appendix page 22), setting up a comprehensive probate system.

There is no office created by this statute or regulation of an administrator or executor of an Indian's estate or will, respecting allotments. There is, therefore, *no representative at law of Joseph Simmons, Sr., deceased, and there cannot be.*

Under these circumstances, appellants filed their complaint, and in Par. X alleged that Section 7 of the Act of 1946 deprived "Joseph Simmons, Sr., *and* the plaintiffs of their property without due process of law;" etc.

Consequently the inquiry is: Can the appellants complain about the Secretary's disinheriting them and depriving their father of his right to devise his property where the Secretary controls the machinery of the traditional party plaintiff (an administrator) and is determined to forbid appellants and their father the enjoyment of their combined rights? We submit the courts

will not permit the Secretary's frustrating the Courts in their efforts to prevent an injustice.

Secondly, assuming that Section 7 of the Act of 1946 be unconstitutional, it has *never* had any efficacy and the property is the appellants' right now and has been since the death of Mr. Simmons, Sr. We include this argument because the Department of Justice urged that the appellants cannot complain because of their failure to receive an "expectancy". But assuming the unconstitutionality of Section 7 the appellants and their father having started out with some land patented in 1915, come out of the Department of Interior probate court and the instant lawsuit empty handed as a result of an Act of Congress. That is why we have courts—to prevent such.

CONCLUSION

The appellants assert that their claim involves a substantial matter and has substantial support, requiring the Court to take plenary jurisdiction over it. As a matter of fact, appellants urge that the discrimination of property rights is here so blatant that the Court could forthwith reverse the District Court in a summary manner.

Respectfully submitted,

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APPENDIX A

1. Act of August 9, 1946, 60 Stat. 968, 25 U.S.C. Sec. 601-607.

"Sec. 601. Membership roll; preparation; persons entitled to enrollment

"The Secretary of the Interior is authorized and directed, with the advice and consent of the Yakima Tribal Council, to prepare a roll showing the members of the Yakima Tribes living on August 9, 1946, which roll shall be kept current and shall constitute the official membership roll of the Yakima Tribes for all purposes. No person who is enrolled with any other tribe of Indians or who has received an allotment of land on any other reservation shall be enrolled under the provisions of Sections 601,607 of this title. The following shall be placed on the roll:

"(a) All living persons who received allotments on the Yakima Reservation, except by fraud.

"(b) All living persons who are of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855 (12 Stat. 951), and who have received allotments on the public domain within the area ceded to the United States by the Yakima Tribes by the treaty of 1855.

"(c) All living persons who have maintained a domicile continuously from January 1, 1941, until August 9, 1946, on the Yakima Reservation, or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951), and who are (1) descendants of persons who received allotments on the Yakima Reservation, except by fraud, or (2) descendants of persons of the blood of the fourteen original Yakima Tribes who received allotments on the public domain within the area ceded by the said treaty of 1855. All living children born after January 1, 1941, but prior to August 9, 1946, to a person entitled to enrollment under this subsection shall likewise be entitled to enrollment under this subsection.

"(d) All children of one-fourth or more blood of the Yakima Tribes born after August 9, 1946, to a parent who is an enrolled member and maintains a domicile on the Yakima Reservation or within the area ceded by the treaty of June 9, 1855, at the time of the birth of the child. Aug. 9, 1946, ch. 933, § 1, 60 Stat. 968."

"Sec. 602 Application to Tribal Council on exclusion from roll; Minors and incompetent persons

"Any person of one-fourth or more of the blood of the Yakima Tribes who may be excluded from enrollment under the provisions of Section 601 of this title may apply for membership at any time and be enrolled upon the approval of the application by a two-thirds vote of the Yakima Tribal Council. Applications for enrollment under this section on behalf of minors and persons mentally incompetent may be filed by any enrolled member of the Yakima Tribes. Aug. 9, 1946, c. 933, § 2, 60 Stat. 969."

"Sec. 603. Correction of membership roll

"Corrections in the roll prepared under Sections 601-607 of this title, by striking therefrom the name of any person erroneously placed on the roll or by adding to the roll the name of any person erroneously omitted therefrom, may be made at any time by the Yakima Tribal Council. Aug. 9, 1946, c. 933, § 3, 60 Stat. 969."

"Sec. 604. Loss of membership and removal from roll

"Every person whose name appears on the roll prepared under Sections 601-607 of this title who holds no vested right, title, or interest in or to any restricted or trust land on the Yakima Reservation or within the area ceded by the treaty of June 9, 1855, and who has failed to maintain any tribal affiliations or a residence on the reservation or within the ceded area for a period of five consecutive years, shall no longer be considered a member of

the Yakima Tribes, and his name shall be removed from the rolls. It shall be the duty of the Yakima Tribal Council to determine, subject to review by the Secretary of the Interior, loss of membership in each case, Aug. 9, 1946, c. 933, § 4, 60 Stat. 969."

"Sec. 605. Expulsion of members; review by Secretary of Interior

"The Yakima Tribal Council may adopt and enforce ordinances, subject to review by the Secretary of the Interior, governing the expulsion of members for any cause deemed by the Council to be sufficient. Aug. 9, 1946, c. 933, § 5, 60 Stat. 969."

"Sec. 606. Back pay and annuities on enrollment of new members

"No person whose name shall after August 9, 1946, be placed on the roll of the Yakima Tribes shall be entitled to any back annuities or per capita payments made to the members of the tribes out of tribal funds which were authorized to be paid to the members of the tribes before such person's name shall have been placed upon such roll. Aug. 9, 1946, c. 933, §6, 60 Stat. 969."

"Sec. 607. Inheritance by non-members

"After August 9, 1946, only enrolled members of the Yakima Tribes of one-fourth or more blood of such tribes shall take by inheritance or by will any interest in that part of the restricted or trust estate of a deceased member of such tribes which came to the decedent through his membership in such tribes or which consists of any interest in or the rents, issues or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951), except that a surviving spouse of less than one-fourth of the blood of the Yakima Tribes may receive by inheritance or devise the use for life of one-half of the restricted or trust lands of the decedent located within the Yakima Reservation or within the area ceded by the said treaty of June 9, 1855. Aug. 9, 1946, c. 922, § 7, 60 Stat. 969."

APPENDIX B

2. Section 1 of the Act of February 8, 1887, 24 Stat. 388, as amended (25 U.S.C. Sec. 331) (The General Allotment Act)

"Section 331. Allotments on reservations; irrigable and nonirrigable lands. In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable grazing land; *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization be-

tween irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein with the consent of the Indians expressed in such manner as the President in his discretion may require. (Feb. 8, 1887, c. 119, §1, 24 Stat. 388; Feb. 28, 1891, c. 383, §1, 26 Stat. 794; June 25, 1910, ch. 431, §17, 36 Stat. 859.)"

APPENDIX C

3. 25 U.S.C. 348 (Sec. 5 of the Act of February 8, 1887, 24 Stat. 389 as Amended).

"Sec. 348. Patents to be held in trust; descent and partition. Upon approval of the allotments provided for in Sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: *and provided further*, That at any time after

lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress; *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the mem-

bers thereof. The patents aforesaid shall be recorded in the General Land Office, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is occupying on February 8, 1887, any of the public lands to which Sections 331 to 334, inclusive, 336, 341, 348 to 350, inclusive, and 381 are applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by sections 331 to 334, inclusive, 336, 341, 348, to 350 inclusive, and 381, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of the said sections and become citizens of the United States shall be preferred."

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APPENDIX D

4. 25 U.S.C. 372 (Sec. 1, Act of June 25, 1910, 366 Stat. 855 As Amended).

"Sec. 372. Ascertainment of heirs of deceased allottees. When any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs

of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cuase the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by any Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid in deferred payments, a further amount, not exceeding 15 per centum of the purchase price may be so forfeited for failure to comply with the terms of sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: *Provided further*, That the Secretary of the Interior is authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent. *Provided further*, That any United States Indian agent, superintendent, or

other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select; *Provided*, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. (June 25, 1910, ch. 431, §1, 36, Stat. 855.)"

APPENDIX E

5. 25 U.S.C. 373 (Sec. 2, Act of June 25, 1910, 36 Stat., 856 as Amended).

"Section 373. Disposal by will of allotments held under trust.

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided*, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the

property is located. *Provided further*, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deed advisable, or use it for their benefit: *Provided also*, That this and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians. (June 25, 1910, c. 431, § 2, 36 Stat. 856; Feb. 14, 1913, c. 55, 37 Stat. 678.)"

APPENDIX F

"6. R.C.W. 11.04.020. Descent of separate real property. When any person shall die seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, as his separate estate, not having devised the same, they shall descend subject to the debts as follows:

* * *

"(5) If the decedent leaves no husband or wife, the estate goes in equal shares to his children, and to the issue of any deceased child by right of representation."

* * *

APPENDIX G

25 C.F.R. Part 15

"Part 15—Determination of Heirs and Approval of Wills, Except as to Members of the Five Civilized Tribes and Osage Indians:

"AUTHORITY: §§ 15.0 to 15.34 issued under Sec. 1, 2, 36 Stat. 855, as amended, 856, as amended, Sec. 1,

38 Stat. 586, 42 Stat. 1185, as amended, Secs. 1, 2. 56. Stat. 1021, 1022; 25 U.S.C. 372, 373, 374, 377, 372a, 373b.

SOURCE: §§15.0 to 15.34 appear at 22 F.R. 10524, Dec. 24, 1957.

"§15.1. Administration of estates. The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part."

APPENDIX H

Opinion of the United States District Court

POPE, Circuit Judge.

The plaintiffs here brought this action by filing a complaint against the Yakima Tribal Council above named and the Chairman thereof. The complaint alleges that plaintiffs are the children and grandchildren of one Joseph Simmons, Sr., who is a member of the Yakima Indian Nation and an enrolled member of the tribe who died May 2, 1960, owning certain interests in Yakima Indian Allotments on the Yakima Indian Reservation in the State of Washington; that they have been denied any interest in the said property of Joseph Simmons, Sr., and denied the right to inherit the same notwithstanding the fact that under the laws of the State of Washington, they would be entitled to inherit his property;[1] and that this denial has

1. 25 U.S.C. § 348 requires that trust patents shall provide that the United States will hold the lands "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located • • •"

been pursuant to the provisions of the Act of August 9, 1946, 60 Stat. 968 (25 U.S.C. § 607), § 7 of which provides: "After August 9, 1946, only enrolled members of the Yakima Tribes of one-fourth or more blood of such tribes shall take by inheritance or by will any interest in that part of the restricted or trust estate of a deceased member of such tribes which came to the decedent through his membership in such tribes or which consists of any interest in or the rents, issues, or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951) * * *."

These allegations are amplified further by what we deem to be amendments of the complaint. During the pendency of the case and prior to the hearing on the several motions to dismiss, plaintiffs filed an affidavit setting forth verbatim certain orders made by the Department of Interior for the purpose of disclosing that the Secretary of the Interior, through his Examiner of Inheritance,[2] rejected plaintiffs' claim of heirship.[3]

These amendments further showed that this rejection of claim of heirship was based on the provisions of § 7, the section here under attack. On August 21, 1964, the Examiner advised plaintiffs' counsel as follows: "We have

2. The Secretary's function of determining heirship of deceased allottees of restricted lands is performed by "Examiners of Inheritance." See 25 C.F.R. 81.1 and "Federal Indian Law" (1958 Revision of Cohen), pp. 76, 77.

3. These orders, added as amendments to the complaint, disclosed that on December 11, 1964, the Examiner advised counsel for plaintiffs: "We have taken sufficient testimony showing the relatives of both parties to determine their heirs, if such relatives were eligible to inherit under § 7 of the Yakima Enrollment Act but we find no eligible relatives." On December 22, 1964, the Examiner advised plaintiffs "To date we have not been able to find any relatives of the above deceased (meaning the decedents referred to in the complaint) for whom a certificate of eligibility could be issued by the Yakima Tribal Council."

taken considerable testimony and have the family of the decedent established. However, under the Act of August 9, 1946 (60 Stat. 968; 25 U.S.C. 607, Section 7), of which you are no doubt fully aware, the relatives of Joseph Simmons, Sr., have been unable to qualify under the above Act to inherit Yakima Indian trust property."

We are therefore confronted with allegations of these facts: the Secretary of the Interior has denied plaintiffs' claim of heirship, and he has denied it on the basis of their inability to meet the requirement of "one-fourth or more blood" of the Yakima Tribes, as required by § 7.

The complaint further alleges that said § 7 is void and unconstitutional for two reasons: first, it is alleged that the Act is wanting in due process because it bears no reasonable relation to the guardianship the United States has over Indians; that it restricts the free choice of Yakima enrollees in prospective spouses and confiscates the Indians' property; and second, it is claimed that the quoted section is unconstitutional because it is "based on a criterion of race contrary to the provisions of the Fifth Amendment to the United States Constitution," citing *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.[4]

The named defendants appeared by motion to dismiss for failure to state a claim upon which relief can be granted, and upon various other grounds including the assertion that the court was without jurisdiction over the subject matter of the action since the power of determining plaintiffs' rights to inherit was within the exclusive

4. "Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." (p. 499, 74 S.Ct. p. 694)

jurisdiction of the Secretary of the Interior; that there was no jurisdiction over the person of the defendants, who were not amenable to suit or to service of process; and that both the Secretary of the Interior and the United States are indispensable parties to the action and the United States moreover had not given its consent to a suit of this character.

The United States, acting through the Attorney General and at his direction, moved the court for leave to intervene and such leave was granted. The petition in intervention of the United States adopted the position of the defendants taken in their motion to dismiss and in effect joined in support of that motion and filed a memorandum of points and authorities in support of such motion.

Because the complaint challenged the constitutionality of the section of the Act above mentioned, a three-judge court was assembled. The case was argued and submitted upon the motion to dismiss made by the defendants and thus joined in by the United States.

We agree that as the complaint was filed there was an absence of an indispensable party, either the Secretary of the Interior, or the United States. But it must be noted that the United States has intervened here, and, as counsel advised us at the hearing, has done so for all purposes.

As we inquire whether on this record we can reach the merits of this case we are confronted with two statutory provisions. One is § 1 of the Act of August 15, 1894, c. 290, 28 Stat. 305 (25 U.S.C. § 345) set forth in the margin,[5]

5. "Sec. 345. Actions for allotments—All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or

which provides in substance that a person who is in whole or in part of Indian blood or descent—who is entitled to an allotment or who claims to have been unlawfully denied or excluded from any allotment may litigate his rights and claims in the proper district court of the United States, naming the United States as party defendant.

The important question at this point arises from the second and later enactment of the Act of June 25, 1910, c. 431, § 1, 36 Stat. 855 (25 U.S.C. § 372). This section provides that when an Indian to whom an allotment has been made dies before the expiration of the trust period "the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

[1] As was noted in Arenas v. United States, 9 Cir., 197 F.2d 418, 420, "the enactment of June 25, 1910 operated to withdraw from the courts jurisdiction to ascertain the heirs of the dead allottees holding under trust patents," citing *Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409, *United States v. Bowling*, 256 U.S. 484, 487, 41 S.Ct. 561, 65 L.Ed. 1054, and other cases.

If we apply that rule literally, if we say, using the words

any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * *."

of the last mentioned Act that the decision here of the Secretary shall be "final and conclusive," and at the same time recognize that there is here a substantial question of constitutional law, then we would be holding that the Secretary could act in an unconstitutional manner, and that his action could not be questioned;—that he had the power finally to determine a constitutional question.

Such a construction of this "final and conclusive" provision can neither be thought to be within the intent of Congress nor can it be consistent with due process. A provision requiring such a construction would be wanting in due process. Such is the holding of *Ng Fung Ho v. White*, 259 U.S. 276, 284-285, 42 S.Ct. 492, 495, 66 L.Ed. 938.[6] It has been held that the action of the Secretary under this section of the Act of June 25, 1910, (25 U.S.C. § 372) is subject to review in a court of equity in a direct proceeding "to inquire into and correct mistakes, injustice and wrong in both judicial and executive action." *Hanson v. Hoffman*, 10 Cir., 113 F.2d 780, 791. As far back as 1871 the Supreme Court, in *Johnson v. Towsley*, 13 Wall. 72, 20 L.Ed. 485, had before it the question of the conclusiveness of the action of the Commissioner of the Land Office where the Act involved provided that his decision in a land contest "shall be final." The Court said (pp. 83-84):

> "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must

6. "To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13, 28 Sup.Ct. 201, 52 L.Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court."

be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted."

[2, 3] We hold that the rule of *Ng Fung Ho, supra,* means that if on examination, we find that there is present here a substantial question as to the constitutionality of § 7, on which the Department acted, we must examine into and review the Department's action. And the Act of August 15, 1894, *supra,* (25 U.S.C. § 345) furnishes the procedure for such a court test,[7] and contains the consent of the United States to be sued. The United States has entered this suit for all purposes. In these circumstances plaintiffs would come within the literal terms of § 345, and § 372 cannot, consistent with due process, prohibit court examination of the constitutional question presented or prohibit plaintiffs from proceedings under § 345.

7. Sec. 10 of the Administrative Procedure Act (5 U.S.C. § 1009): "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute * * *." It may well be that after the United States intervened plaintiffs' complaint should have been further amended so as specifically to ask judgment against the United States. On this motion to dismiss we must disregard any such amendable defect. *Conley v. Gibson,* 335 U.S. 411, 78 S.Ct. 99, 2 L.Ed.2d 80.

[4] We come then to the merits of plaintiffs' complaint, and inquire as to the validity of § 7 (25 U.S.C.S. 607). It is well settled that Congress has plenary control over Indian tribal relations and property and that this power continues after the Indians are made citizens. *Williams v. Johnson*, 239 U.S. 414, 420, 36 S. Ct. 150, 60 L.Ed. 358. "After 1871, Congress turned from regulating Indian affairs by treaties to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." *Board of County Com'rs of Creek County v. Seber*, 318 U.S. 705, 716, 63 S.Ct. 920, 926, 87 L.Ed. 1094.[8]

As stated in *Tiger v. Western Investment Co.*, 221 U.S. 286, 310, 31 S.Ct. 578, 584, 55 L.Ed. 738, "We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such." And as there noted (p. 311, 31 S.Ct. p. 584) "'Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. *Lone Wolf v. Hitchcock*, 187 U.S. [553] 565 [23 S.Ct. 216, 47 L.Ed. 299].'"[9]

[5] This plenary power of Congress to legislate with respect to Indian rights exists regardless of whether the

8. See also the cases cited by the Court in a footnote appended to the quoted statement.

9. That traditionally the Supreme Court has declined to question congressional or administrative action with respect to the Indian membership and Indian property was recently recognized in *Baker v. Carr*, 369 U.S. 186 at p. 215, 82 S.Ct. 691, 7 L.Ed.2d 663. See also dissenting opinion, p. 282, 82 S.Ct. p. 746.

Indians are citizens or otherwise. *Brader v. James*, 246 U.S. 88, 96, 38 S.Ct. 285, 62 L.Ed. 591. And it was early held that included in this plenary power of Congress was the power to regulate and determine tribal membership. In short, Congress, or its delegated agents, had full power to define and describe those persons who should be treated and regarded as members of an Indian tribe and entitled to enrollment therein. *Stevens v. Cherokee Nation*, 174 U.S. 445, 488, 18 S.Ct. 722, 738, 43 L.Ed. 1041.[10]

[6-8] It appears plain that in the Act of August 9, 1946, Congress was doing no more than defining what constituted membership in the Yakima Tribes.[11] It is true that in doing so it specified a minimum quantum of Yakima Indian blood, but it seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood. What was done here was in line with what Congress had previously done. The cases of *Tiger v. Western Investment Co., supra, United States v. First National Bank of Detroit*, 234 U.S. 245, 260, 34 S. Ct. 846, 58 L.Ed. 1298, and *United States v. Ferguson*, 247

10. "We repeat that, in view of the paramount authority of congress over the Indian tribes, and of the duties imposed on the government by their condition of dependency, we cannot say that congress could not empower the Dawes commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes, and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes." See in accord *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306, 307, 23 S.Ct. 115, 47 L.Ed. 183.

In referring to the *Stephens* case, *supra*, "Federal Indian Law" (1958 Revision of Cohen, *supra*) (p. 43) states: "Thus, the United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property."

11. The enactment of the Act of August 9, 1946, did not affect any vested property rights of plaintiffs. Their ancestor did not die until May 2, 1960. Up to that time plaintiffs had a mere anticipation of heirship. A statute fixing heirs may be altered at any time. This plaintiffs admit.

U.S. 175, 38 S.Ct. 434, 62 L.Ed. 1052, furnish illustrations of the fact that Congress in legislation has not hesitated to place full-blood Indians in one class and all others in another, giving one class more rights than the other.

The Act which authorizes the Secretary of the Interior generally to make up membership rolls of any Indian tribe directs that such rolls shall contain the ages and "quantum of Indian blood" of those placed on the rolls. Act of June 30, 1919, 41 Stat. 9, (25 U.S.C. § 163). The Act. of May 25, 1918, 40 Stat. 564, (25 U.S.C. § 297), provided that appropriations made to educate Indian children should not be used to educate children of "less than one-fourth Indian blood" where there are adequate free school facilities in the State. Under the Act of May 7, 1948, 62 Stat. 211, (25 U.S. C. § 482), certain loans available for tribes and individual Indians are prohibited to be made Indians "of less than one-quarter Indian blood." The Act of August 27, 1954, 68 Stat. 868, (25 U.S.C. § 677aa) relating to the Ute Indians, divides all such Indians into "full-blood" meaning those having an excess of one-half Indian blood, and "mixed-blood," and provides for separate and distinct rights and treatments of the two classes of Indians.[12]

It is plain the Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race"

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12. Sec. 677d of Title 25 contains the following statement: "Effective on the date of publication of final rolls as provided in § 677g of this title the tribe shall thereafter consist of full-blood members."

Indians can only be defined by their race.[13]

[9] We hold that there was a rational basis for the classification provided in § 7, *supra*. Necessarily continued intermarriage with white persons would ultimately produce persons who were in no true sense Indians. At some reasonable point a line must be drawn between Indians and non-Indians, between those properly to be regarded as continuing members of the tribe, and those who are not. Their case has no resemblance to *Bolling v. Sharpe, supra*, where the segregation of pupils, by race, in public schools was held a violation of the Fifth Amendment.

We hold that the complaint here fails to state a claim, that it cannot be amended to state a claim since plaintiffs are obviously without rights in the premises, and the complaint, and the action are dismissed with prejudice.

Judgment to that effect will be entered.

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13. A few of the instances in which special regulations have been enacted which apply exclusively to Indians as such are as follows:

Limitation on contracts without the Secretary's approval, 25 U.S.C. §§ 81, 82, 82a, 84.

Limitation on application of tribal funds, 25 U.S.C. § 122.

Limitation of rights of white men marrying Indian women, 25 U.S.C. § 181.

Limitation on persons permitted to trade with Indians, 25 U.S.C. §§ 261, 262, 263, 264.

Limitation on sending Indian children to school out of state, 25 U.S.C. § 286.

Placing Indian pupils in Indian Reform School, 25 U.S.C. § 302.

Restrictions on sale or lease of lands, 25 U.S.C. §§ 348, 391, 393.

A logical application of plaintiffs' position respecting the unconstitutionality of a "criterion of race" would cast doubt on all such legislation. Defendants have made this point as follows: "Let us assume that every statute which has race as the basis of its classification violates the Fifth Amendment as alleged by the Plaintiffs. If this be so, then every statute relating to Indians, qua Indians, is unconstitutional. The trust established over 'Indian' lands is unconstitutional. The allotment to Lucy Simmons, and the authorization of the inheritance of Joseph Simmons, Sr., are each based on the determination that the individual in question is an Indian. The plaintiffs say this is unconstitutional – so be it. By what right do plaintiffs claim any right to this land?

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1112

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW and those similarly situated, APPELLANTS

v.

CHIEF EAGLE SEELATSEE, individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION, APPELLEES

UNITED STATES OF AMERICA, INTERVENOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(c) of the Revised Rules of this Court, the United States, Intervenor, moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment entered December 6, 1965, by a three-judge court convened in the United States District Court for the Eastern District of Washington, Southern Division, pursuant to 28 U.S.C. 2282.

Joseph Simmons, Sr., an enrolled Yakima Indian, died in 1960, leaving no will. Land had been allotted to him in 1915 by a trust patent under the General Allotment Act of February 8, 1887, Section 5, 24 Stat, 389, as amended, 25 U.S.C. 348. That statute provided that the laws of descent of the State where the land was located should apply thereto (J.S. App. 17-19). An Act of June 25, 1910, 36 Stat. 855, Section 1, as amended, 25 U.S.C. 372, provided that the ascertainment of heirs of an Indian allottee by the Secretary of the Interior should be conclusive. Plaintiffs, the children and grandchildren of Simmons, Sr., are his heirs at law. However, they do not qualify under the Act of August 9, 1946, Section 7, 60 Stat. 969, 25 U.S.C. 607, which provides that henceforth only enrolled Yakima Indians of one-fourth or more blood could inherit allotments within the reservation, with an exception for a surviving spouse. The consequence is that the land will escheat to the Yakima Tribe.[1]

Plaintiffs brought this suit against tribal officials to enjoin enforcement of the 1946 Act on the ground of

[1] The Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. 373a, provides for escheat to the tribe of allotted Indian lands in case of death intestate without heirs.

unconstitutionality. After various motions and jurisdictional defenses were made (J.S. App. 25-26), the United States intervened, adopting the defendants' position and urging that the Act was constitutional. The district court rejected the jurisdictional defenses but sustained the statute.

ARGUMENT

Appellants' Attack On The Statute Lacks Substance

The plenary control of the United States over Indian affairs needs no restatement. One aspect of Congressional policy in this area has been to preserve tribal identity, and to that end, to maintain the tribal property in the hands of the members of the tribe. The implementation of that policy necessarily involves distinctions based on the quantum of Indian blood and tribal relationship. The statute challenged here is no more than an instance of such traditional regulation.[2]

Appellants point out that all Indian tribes are not governed by the sames rules in this respect. But that is a product of history and differing circumstances. It is enough that all prospective Yakima inheritors of equal blood are accorded equal treatment. Nothing requires that the Yakimas be treated like the Five Civilized Tribes or others.

Nor does the 1946 statute divest vested rights. Appellants themselves seem to recognize that until 1960

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[2] It was not until the 1910 Act that restricted land could be devised and then only with approval. *Federal Indian Law* (G.P.O. 1958), p. 79).

they had "a mere anticipation of heirship" (J.S. App. 31, n. 11). To be sure, they speak of their ancestor's right to devise his property (J.S. 11) and seek to analogize their rights to a treaty recognized right of a tribe (J.S. 7-8). But in the cited cases the United States had diverted tribal property to its own use. Here the tribal restrictions on succession are designed to protect the tribe in its reservation free of undue dilution. Congress is, of course, free to change its policy with respect to the Yakima Indians, as it has been urged to do.[3] That is, however, a matter wholly within the legislative discretion.[4]

---

[3] Suggested legislation has been regularly introduced in Congress since that time. See, *e.g.*, H. Rep. No. 1387, 86th Cong., 2d Sess., and a bill is now pending before the House Committee. H.R. 10020, 89th Cong., 1st Sess.

[4] In defending this provision, the Chairman of the Tribal Council suggested other alternatives that would be available prior to death. See Hearings, House Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs on H.R. 4005, 85th Cong., 2d Sess., pp. 40, 47. Those hearings reviewed an intra-tribal dispute about this matter, among other things. Federal courts do not take jurisdiction over such intra-tribal controversies. *Littell* v. *Nakai*, 344 F.2d 486 (C.A. 9), certiorari denied, 382 U.S. 986; *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (C.A. 10); *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F.2d 767 (C.A. 10); *Martinez* v. *Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915 (C.A. 10), certiorari denied, 356 U.S. 960.

CONCLUSION

It is submitted the judgment should be affirmed summarily.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

APRIL 1966.

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No. 1112

In the Supreme Court of the United States

October Term, 1965

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW, and those similarly situated, *Appellants*,

v.

CHIEF EAGLE SEELATSEE, Individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION, *Appellees*,

UNITED STATES OF AMERICA, *Intervenor*.

On Appeal From the United States District Court For The Eastern District of Washington, Southern Division

MOTION TO DISMISS AND/OR AFFIRM

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In the Supreme Court of the United States

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JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW, and those similarly situated,
Appellants,

v.

CHIEF EAGLE SEELATSEE, Individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION,
Appellees,

UNITED STATES OF AMERICA,
Intervenor.

On Appeal From the United States District Court For The Eastern District of Washington, Southern Division

MOTION TO DISMISS AND/OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that the appeal is not within the jurisdiction of this court and/or that the final judgment and decree of the District Court be affirmed on the grounds that the question is so unsubstantial as not to warrant further argument, and that the decision of the District Court is correct.

STATEMENT

This is a direct appeal from the final judgment and decree entered on December 6, 1965, by a District Court of three judges dismissing the appellants' complaint which sought to declare unconstitutional Sec. 7 of the Act of August 9, 1946, c. 933, 60 Stat. 968, 25 U.S.C. § 607, Appendix A, page 15, Jurisdictional Statement, and to enjoin the appellee, Tribal Council, and its Chairman, from taking any action which would keep appellants from being able to qualify under said section to inherit Yakima Indian trust property. (Hereafter, for continuity, the section attacked will be referred to as Sec. 7.)

Appellants brought this action in the United States District Court for the Eastern District of Washington, alleging that said Sec. 7 is unconstitutional and void, and complaining that the Secretary of Interior, through his Examiner of Inheritance, rejected appellants' claim of heirship. Appellees appeared by motion to dismiss for failure to state a claim upon which relief can be granted, and upon various other grounds including assertions that the court was without jurisdiction. The United States, acting through the Attorney General, moved the court for leave to intervene and such leave was granted. The petition in intervention of the United States adopted the position of the appellees taken in their motion to dismiss, and in particular stated that the court lacked jurisdiction, and that said Sec. 7 of the Act is constitutional.

The three judge District Court, after argument on the motion to dismiss, held that the complaint failed to state a claim, that it could not be amended to state a claim since appllants are without rights in the premises, and dismissed the complaint and action with prejudice.

ARGUMENT

A. This Appeal Is Not Within the Jurisdiction Of This Court.

The Secretary of the Interior, not this court, has exclusive jurisdiction regarding the descent and distribution of the trust estate involved in this case, and his findings are final and conclusive.

> Sec. 1, Act of June 25, 1910, 36 Stat. 855; amended March 3, 1928, c. 122, 45 Stat. 161; amended Apr. 30, 1934, c. 169, 48 Stat. 687; 25 U.S.C. § 372, Appendix D, pages 19–21, Jurisdictional Statement.
>
> Title 25, Code of Federal Regulations, Part 15, Appendix G, pages 22-23, Jurisdictional Statement.

Hallowell v. Commons, 239 U.S. 506 (1916).

McKay v. Kalyton, 204 U.S. 458 (1907).

Appellants have not pursued the administrative prerequisite even to the point of a Secretarial determination that they are the natural heirs of the decedent allottee. In the absence of such administrative determination, the appellants had and have no standing to bring or continue this action.

There is no jurisdiction over the person of appellees in this action, as the actions appellants seek to enjoin

are official acts of a Tribe or Nation that is not amenable to suit.

United States v. U. S. Fidelity & Guaranty Company, 309 U.S. 506 (1940).

Turner v. United States, 248 U.S. 354 (1919);

The cases cited in support of jurisdiction in the Jurisdictional Statement are not controlling. *Radio Corp. v. United States*, 341 U.S. 412 (1951), is a decision regarding an administrative order not a Federal statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), and *Florida Lime Growers v. Jacobsen*, 362 U.S., 73 (1960), are cases involving state statutes, not a Federal statute.

B. The Question Involved Is so Unsubstantial as Not to Warrant Further Argument, and the Decision of the District Court Is Correct.

The final judgment and decree of the District Court should be affirmed, as the question raised by appellants is so unsubstantial as not to warrant further argument, and further the decision of the District Court is clearly correct. Appellants' theory in the District Court was that since the recipients of certain trust estates must have a minimum quantum of Yakima Indian blood that said Sec. 7 is unconstitutional because the classification was based on race. When Congress deals with Indians and defines what constitutes an Indian it must and does refer to quantum of Indian blood. To declare this classification unconstitutional would be to destroy completely the plenary power that Congress has and exer-

cises under its legislative powers specified in the United States Constitution (U. S. Const., Art. I, Sec. 8, Cl. 2). Appellants have apparently abandoned that theory and now argue that this case "is important because public and private agencies have decried the law's unfairness and because it has deprived several hundred Indian children of their inheritance, and because the Secretary of Interior is continuing to enforce it." (J.S. p. 4). Selective excerpts from Congressional hearings are then set forth to substantiate this position. These arguments are better left to Congress where they, and contraverting arguments, have been made. The question appellants also raise is that "an allotment such as we have here, for all practical purposes, is the vesting in the allottee of a tenancy in fee simple absolute, except that he cannot alienate it without the Secretary of the Interior's approval." (J.S., p. 7). This demonstrates a basic misunderstanding of the allotment system. Appellants beg the question by their analogy to a tenancy in fee simple. Indian lands, reserved at the time of the Treaty, are held in trust by the government for the benefit of the Tribe. Individual allotments granted from this Tribal property were made pursuant to the General Allotment Act (Sec. 1 of the Act of February 8, 1887, c. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331, Appendix B, page 16, Jurisdictional Statement). They were made under Congress' power to determine who among the Tribe should enjoy the benefits of this Tribal property. Trust or restricted pat-

ents give one Tribal member dominion over this allotment to the exclusion of all others, subject to the restrictions imposed under the plenary power of Congress. As was acknowledged by the District Court, appellants' position would, if pressed to a logical conclusion, render the very existence of the original trust patent void ab initio because it was based on race and blood quantum. Appellants rely on said patent to sustain their interest in the res. If appellants' position were upheld it would follow that any trust established for the benefit of any Indian Nation or Indian would be unconstitutional because of the necessity of defining the cestui on the basis of blood quantum. To preserve the trust res for the benefit of those for whom the trust was created, Congress has determined that to inherit beneficial interests in the lands originally reserved by the Yakima Tribe and held in trust by the United States, one must be at least one-quarter blood Yakima Indian. Appellants' argument is that Congress was wrong, and the right to determine the benefits should be based on relationship to the original allottee. This argument, again, is better left to Congress. The trial court correctly upheld the constitutionality of Sec. 7, which determined who should have the benefits of Yakima Indian Trust Land. The District Court correctly held that Congress had the plenary power to determine the right of these beneficial interests. That Congress has the plenary power to deal with trust interests has been clearly established by this court. There are no

contrary decisions and this rule has been firmly established in the following cases:

Tiger v. Western Investment Company, 221 U.S. 286 (1911);

United States v. First National Bank of Detroit, 234 U.S. 245 (1914);

United States v. Ferguson, 247 U.S. 175 (1918);

Hallowell v. Commons, 239 U.S. 506 (1916);

McKay v. Kalyton, 204 U.S. 458 (1907);

United States v. Jackson, 280 U.S. 183 (1930);

Sizemore v. Brady, 235 U.S. 441 (1914);

United States v. Rowell, 243 U.S. 464 (1917).

Shoshone Tribe v. United States, 299 U.S. 476 (1937), cited in the Jurisdictional Statement, is not controlling. To constitute "an appropriation of property within the meaning of the Fifth Amendment," it should appear that the aggrieved part has a property right. The Shoshone Tribe did. The Appellants do not.

United States v. Creek Nation, 295 U.S. 103 (1935), cited in the Jurisdictional Statement is not controlling. The Creek Nation held the property involved in fee simple. Appellants do not.

Korematsu v. United States, 323 U.S. 214 (1944), cited in the Jurisdictional Statement is not controlling, for as observed by appellants this case did not involve property rights.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), cited in the Jurisdictional Statement is not controlling. Again

the moving parties had a vested interest in the property. Appellants do not.

Regan v. Farmer's Loan & Trust Company, 154 U.S. 362 (1894), cited in the Jurisdictional Statement is not controlling. There was a vested property right involved. Here there is none.

Bolling v. Sharpe, 347 U.S. 497 (1954), cited in the Jurisdictional Statement is not controlling. As the District Court points out, segregation of a public school by race has no relationship to Congress' power to determine who is and who is not an Indian, and to further determine rights flowing from said determination.

CONCLUSION

We respectfully submit, therefore, that this appeal is not within the jurisdiction of this court and should be dismissed, and/or that the final judgment and decree of the District Court be affirmed on the grounds that the question involved is so unsubstantial as not to warrant further argument, and that the decision of the District Court is correct.

Respectfully submitted,
JAMES B. HOVIS
Counsel for Appellees

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IN THE

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October Term, 1965

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v.

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Appellees,

UNITED STATES OF AMERICA,
Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS and/or AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS and/or AFFIRM

ARGUMENT

It is amazing how a dispute can be narrowed to the crux of the matter by the briefs. We suggest that the statement in the Appellees' brief at page 7 poses the main problem, as follows:

"*Shoshone Tribe v. United States*, 299 U.S. 476

(1937), cited in the Jurisdictional Statement, is not controlling. To constitute 'an appropriation of property with in the meaning of the Fifth Amendment,' it should appear that the aggrieved part(y) has a property right. .The Shoshone Tribe did. *The Appellants do not.*" (Emphasis supplied.)

In determining what rights the Appellants have, we thought it would be helpful to set forth the patent as follows:

"447486 4-1063-R

"9626-14 I.O.

"THE UNITED STATES OF AMERICA

"3839

"TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

"WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Lucy Simmons, an Indian of the Yakima Reservation, has been allotted the following—described land:

"The lots one and two of Section one in Township eight north of Range twenty-one east of the Willamette Meridian, Washington, containing seventy-nine and ninety-six hundredths acres:

"NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the Land above described, and hereby declares that it does and will hold the Land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, dis-

charged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States.

"IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the twentieth day of October in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and fortieth.

"By the President: WOODROW WILSON
"By M. P. LEROY, Secretary
"L. Q. C. LAMAR
"Recorder of the General Land Office

"RECORD OF PATENTS: Patent Number 494606"

This, of course, parallels the authority granted the Secretary of the Interior in 25 U.S. Code 348(J.S.17).

Appellants assert that whenever a person in the United States receives a patent running to himself and to his heirs, *he has a vested property right*, free from expropriation and certainly free from full governmental expropriation which is discriminatory as to him. He cannot be singled out and treated differently than other persons in the United States (disregarding invasions for his benefit).

The Appellee Tribal Council in the trial court tried to justify the escheatment to the Tribe because of its spontaneously—created right of "reversion;" the Solocitor General states a similar idea when he calls the instant property "tribal." There is no case authority supporting such a thought. Moreover an examination of 25 U.S. Code 348 (J.S.17 & 18) belies such agrument. Thus, as to *unallotted* tribal property "The Secretary of the Interior (may) negotiate • • • for the purchase and release • • • of such portions of its reservation not allotted • • •." *Hence the allotment statute contemplates the full divestment of the Tribe's rights when land is allotted,* negotiation for a release by the Tribe being necessary only for the *unallotted* land. Judge Whitson in *LaClair v. United States,* (1910) 184 Fed. 128, 129 (E.D. Wash) called the allotment system "• • • the taking of lands in severalty • • •."

This court in *Heckman v. United States,* (1911) 224 U.S. 413 at page 438 called an allottee's rights as "proprietary," and at page 439 assumes the United States has no "pecuniary" interest in the allotment, having an interest only as "guardian."

In *Creek Nation v. United States,* 302 U.S. 620 (1938) the issuance of allotments to neighboring Indians was a sufficient divestment as to constitute a "taking" of Creek property.

In discussing Congress' plenary control as related to the allotment system, the court in *United States v. Rowell,* (1917) 243 U.S. 464, 468, limited the same, commenting that Congress had no power to violate "fundamental

rights." Indeed the whole basis of *Rowell* is that had Rowell's application ripened, he could have invoked the doctrine that "rights created by carrying them into effect (i.e., the fulfillment of the statute by the issuance of an allotment patent) cannot be divested or impaired." Accord, *Sizemore v. Brady*, (1913) 235 U.S. 441, 450.

Ballinger v. Frost, (1910) 216 U.S. 240 best sets the instant case at rest. An applicant for an allotment had fully qualified for the same but the Secretary had refused to issue it. In ordering a writ of mandamus for the patent, the court stated at page 248:

> "• • • We have no disposition to minimize the authority or control of the Secretary of the Interior and the court should be reluctant to interfere with his action. But as said by Mr. Justice Field in *Cornelius v. Kessel*, 128 U.S. 456, 461:
>
> " 'The Power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a *vested* interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' " (Emphasis supplied).

To be sure, the contest in *Frost* was between the Secretary and an applicant for an allotment; here, it is between an allottee and the Congress. But the Constitution inhibits

the Congress as to "vested" rights just as much as it inhibits an executive officer.

To put the Solicitor General's argument in ~~content~~ context: "Here the tribal restrictions on succession are designed to protect the Tribe in its reservation free of undue dilution" by taking *vested* property and giving it to the Tribe. It is time the judiciary acted to correct such.

We agree that this cause can be summarily decided.[1]

Respectfully submitted,

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1. We pass by the Appellees' Motion relating to jurisdiction, relying on the District Court's opinion (J.S. 25-29). Significantly the Solicitor General ignored the point, too.

END